SUPREME COURT OF THE UNITED STATES

October Term, 19[illegible]

No. [illegible] 74

FORREST A. FAY, Administrator of the Estate of Grace Ann Fay, Deceased, and ADRIAN LARA,

Petitioners,

vs.

HOWARD H. SWIGGETT,

Defendant,

AND

THE EQUITABLE MUTUAL INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WARREN G. HARDING,
Counsel for Petitioners.

[illegible]

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion below	2
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement	4
Specification of errors to be urged	8
Reasons for granting the writ	8
Conclusion	12

Cases Cited

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673	8
Hagar v. *Reclamation District, No. 108*, 111 U. S. 701	11
Insurance Co. v. *Leslie*, 47 Ohio St. 409	9
Missouri Pacific Railroad Co. v. *Humes*, 115 U. S. 512	11

Statutes Cited

Ohio General Code, Section 9510-4	3
Ohio General Code, Section 9586	3, 7, 8, 9
28 U.S.C., Section 1257	2
United States Constitution, Amendment 14, Section 1	2, 11

AUG 7 1963

210059

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 666

ROBERT A. FAY, ADMINISTRATOR OF THE ESTATE OF GLORIA ANN FAY, DECEASED,

Petitioner,

vs.

HOWARD B. SWICKER,

Defendant,

AND

THE REPUBLIC MUTUAL INSURANCE COMPANY,

Respondent

ABELYN LARA,

Petitioner,

vs.

HOWARD B. SWICKER,

Defendant,

AND

THE REPUBLIC MUTUAL INSURANCE COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above entitled cases on December 16, 1950.

Opinion Below

The opinion of the Common Pleas Court of Erie County, Ohio (R. 79) is not reported. The opinion of the Court of Appeals for Erie County, Ohio (R. 74) is not reported. The opinion of the Supreme Court of Ohio (R. 62) is reported in 154 Ohio St. 341.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on December 16, 1950 (R. 5). A duly filed application for rehearing in the above entitled cases was overruled on January 10, 1951 (R. 5). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257, paragraph 3. The federal question is raised under the United States Constitution, Amendment 14, Section 1;

> "nor shall any state deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws".

The issue of the violation of this clause of the federal constitution was raised by the petitioners for the first time in the application for rehearing, filed in the Supreme Court of Ohio where the following claim appeared: (R. 93)

> "This Court by reversing the judgment of the lower Court without in any way modifying or reversing any of the law as pronounced in the numerous cases followed by our Court of Appeals has deprived these appellees of their constitutional right to the equal protection of the duly enacted laws of our State and Nation."

It was not possible to raise the federal question at an earlier time since it first arose by the judicial action of the

Supreme Court of Ohio in repealing and nullifying a duly enacted statute of the State of Ohio. It is this denial by the state judiciary of rights conferred upon the petitioners by the General Assembly of the State of Ohio which constitutes a denial to the petitioners of the equal application and protection of such duly enacted legislation and the deprivation of property rights without due process of law. Until the rendition of its decision by the Ohio Supreme Court, petitioners rightfully assumed that any judgment of the Ohio Supreme Court would be subject to the duly enacted legislation of the State of Ohio.

Question Presented

Whether the highest court of a state can effectively repeal a specific statute duly enacted by the legislature of that state without depriving the petitioners of their constitutional rights under the 14th Amendment to the United States Constitution, Section 1.

Statutes Involved

The statutory provisions of the State of Ohio in so far as they are pertinent to the present subject are as follows:

Section 9586, Ohio General Code:

> "A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company or association, thereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Section 9510-4, Ohio General Code:

> "Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on

account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which same judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law."

Statement

The petitioners were the plaintiffs in two separate cases, numbered 25585 and 25588, brought in the Court of Common Pleas of Erie County, Ohio, against the defendant Howard B. Swicker, respectively for wrongful death and for personal injuries proximately caused by the negligent operation of an automobile driven by Howard B. Swicker on March 9, 1946 (R. 7, 12). The two cases resulted in judgments for the respective plaintiffs, R. A. Fay, Administrator, in the amount of $800.00; and Abelyn Lara, in the amount of $7500.00. Judgments were entered on May 23, 1947 in the Court of Common Pleas of Erie County, Ohio (R. 10, 14).

On June 27, 1947 both of the successful plaintiffs filed supplemental petitions pursuant to Ohio General Code, Section 9510-4, set forth above, making the respondent herein, The Republic Mutual Insurance Company, an additional defendant for the purpose of applying to the payment of such judgments the insurance issued to Howard B. Swicker by said respondent (R. 7, 12). The defendant insurance company, respondent herein, filed an answer in each case denying that the defendant Howard B. Swicker was covered under any policy of insurance by reason of false representations made by Howard B. Swicker in applying to the respondent for casualty insurance to the effect (1) that defendant Howard B. Swicker had had no automobile accident or loss during the two years preceding said application with exception of one small claim a year previous and also (2) that no automobile insurance covering defendant Howard B. Swicker had been declined or cancelled (R. 9, 13).

A joint trial was then had of the issue of effective insurance coverage as raised by the supplemental petitions. It was the testimony of defendant Howard B. Swicker in substance that he told the agent of the respondent, one Harrison W. Zuercher, of a previous cancellation of insurance by another insurance company, and also of accidents other than the small claim referred to in the answer of respondent (R. 18-19). According to the testimony of Mr. Swicker, he signed the application in blank form with respect to the questions relating to cancellation of previous insurance and to other accidents, leaving to the company's agent, Mr. Zuercher, the task of filling in the answers to such questions in accordance with the statements made by Swicker to the agent (R. 31-32).

The application was then sent in to the company by its agent with false answers to the two questions relating to

cancellation of other insurance and other accidents (R. 33). The company then issued its policy of insurance to defendant Howard B. Swicker and sent it to Mr. Zuercher, its agent, for delivery to the insured (R. 33, 55). Prior, however, to such delivery of the policy then in the agent's possession, the accident occurred which gave rise to the petitioners' judgments (R. 54). In the policy as issued, there was contained the following language:

> "By acceptance of this policy the named insured agrees that the statements in the foregoing declarations are his statements and representations, which he warrants to be true, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."
>
> "Misrepresentation and fraud. This entire policy shall be void if insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud, or false swearing by the insured regarding any matter relating to this insurance or the waiver thereof, whether before or after a loss.
>
> "Waiver or change. No notice to an agent, or knowledge possessed by an agent or by any other person shall be held to effect a waiver or change in any part of this policy, nor estop the company from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the president or secretary of the company." (R. 58).

Upon trial, the Common Pleas Court of Erie County found, in favor of the petitioners, that the defendant Swicker was insured by the respondent and judgment was entered in favor of the petitioners against the respondent for $800.00 and $5000.00 respectively (R. 11, 15).

The Common Pleas Court's opinion rendering judgment

was based on Section 9586 Ohio General Code, cited above, which constitutes the agent of the company despite anything to the contrary in the application or the policy. (R. 85).

Upon the same basis these judgments were affirmed by the Court of Appeals for Erie County (R. 60, 61, 75-76).

After allowance of a motion to certify the record by the Supreme Court of Ohio, the judgment of the Court of Appeals for Erie County in both cases was reversed and final judgment entered for the respondent insurance company (R. 2-3).

The holding of the Supreme Court of Ohio is expressed in the two syllabi of its opinion which, under Rule VI of the Ohio Supreme Court, is written by the Court and states the law of the case. These syllabi are as follows:

> "1. At common law, ordinarily the knowledge of an agent, received while he is acting within the scope of his authority and in reference to a matter over which his authority extends, is imputed to such agent's principal.
>
> "2. A principal and a third party have the authority to enter into a contract supplanting with a different rule the common-law rule as to the knowledge of such principal's agent being imputed to the principal, and such contract is valid and enforceable in the absence of circumstances creating an estoppel or making the enforcement of such contract inequitable." (R. 62).

The "contract supplanting with a different rule" referred to in the second syllabus is found in the language of the policy issued by the respondent insurance company, which purports to restrict the authority of the agent by stating that notice to the agent does not constitute notice to the agent's principal (R. 68).

This holding was achieved in spite of the fact that Section 9586 Ohio General Code states:

> "A person who solicits insurance and procures the application therefor, shall be held to be the agent of

the party, company or association, thereafter issuing a policy upon such application or a renewal thereof, *anything in the application or policy to the contrary notwithstanding.*" (Emphasis ours).

Specification of Errors to Be Urged

The Supreme Court of Ohio erred in ignoring and, by ignoring, repealed the act of the Ohio General Assembly, General Code, Section 9586. By such holding, reversing the Court of Appeals for Erie County, Ohio, the Supreme Court of Ohio denied petitioners their constitutional rights under Amendment 14, paragraph 1, of the Constitution of the United States.

Reasons for Granting the Writ

(1) A decision by the highest court of a state involving a state statute can be such a state act as is prohibited by the due process and equal protection clauses of the 14th Amendment. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill**, 281 U. S. 673, 1930. Mr. Justice Brandeis, on page 679 stated:

"If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious. *Ettor* v. *Tacoma*, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an

---

[*Note: This case also establishes the jurisdictional fact that in the present case the federal question was properly invoked for the first time by a seasonably filed application for a rehearing. In the *Brinkerhoff* case as in the present case, the federal claim did not arise until the rendition of the decision of the highest court of the state. Under these circumstances, the first opportunity to raise the federal question is upon a petition for rehearing.]

> otherwise valid (*First Nat. Bank* v. *Weld County*, 264 U. S. 450, 68 L. ed. 784, 44 Sup. Ct. Rep. 385) state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative branch of government."

(2) Prior to the decision by the Supreme Court of Ohio, which is the subject of this petition, the law of Ohio was clearly established that the provisions of General Code, Section 9586 were not subject to waiver by agreement of the parties. This had been clearly held in *Insurance Co.* v. *Leslie*, 47 Ohio St. 409, 1890. In this case the second syllabus (which, under the Ohio rule, states the law of the case) reads in pertinent part as follows:

> "The statute cannot be regarded as conferring upon the assured a mere personal privilege which may be waived by agreement. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability."

This decision, however, merely states the rule that is specifically contained in the words of the statute, Ohio General Code, Section 9586 as appears in the proviso "anything in the application or policy to the contrary notwithstanding". The Court of Appeals for Erie County, Ohio, the intermediate appellate court in the instant cases, stated in its opinion (R. 75-76):

> "We have had in Ohio for many years a clear statutory rule, declaratory of the soliciting agent's authority, and it is well settled that the authority so given by statute (now Section 9586, General Code) can not be cut down or reduced by any limitation attempted to be imposed by the insurer."

The Ohio Court of Appeals then cited the following cases in support of this proposition:

> "*Union Ins. Co.* v. *McGookey, et al.*, 33 Ohio St. 555;
> *Insurance Co.* v. *Williams*, 39 Ohio St. 584;
> *Humboldt Fire Ins. Co.* v. *R. K. LaBlond Machine Tool Co.*, 96 Ohio St. 442;
> *Foster* v. *Scottish Union National Insurance Co.*, 101 Ohio St. 180;
> *Hall* v. *Franklin Fire Insurance Co.*, 149 Ohio St. 216;
> *Pateras* v. *Standard Insurance Co.*, 37 Ohio App. 383."

Of course, the existing law, including Ohio General Code, Section 9586, is and must be construed as part of the contract made while such law was in force. *Insurance Co.* v. *Leslie, supra.*

Thus, Ohio General Code, Section 9586, clearly constituted the agent Zuercher a full and complete agent of the respondent. This is a result of a clear legislative enactment. That enactment also forbids any variation of the agency situation by means of an agreement in the policy. This is the law established by the legislative branch of the government of the State of Ohio.

The decision of the judicial branch of the government of the State of Ohio in the present cases, allowing modification of the agency relationship by agreement, is so directly contrary to the cited statutory prohibition that this decision in effect nullifies and repeals duly enacted legislation of the General Assembly of Ohio.

(3) Although petitioners fully realize the frequent statement of this Court that the 14th Amendment of the United States Constitution cannot be invoked merely to correct an erroneous state court judgment, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra,* nevertheless this Court has stated the rule that where any act of state government,

whether by the legislative, executive, or judicial arm, exceeds the realm of mere error and becomes "arbitrary, oppressive and unjust" the due process requirement of the 14th Amendment can be successfully invoked. *Hagar* v. *Reclamation District, No. 108,* 111 U. S. 701, 1884, *Missouri Pacific Railroad Co.* v. *Humes,* 115 U. S. 512, 1885.

It is submitted that where a litigant, relying upon the specific words of a statute enacted for his benefit and 100% applicable to his case, is confronted with a denial of his rights under that statute, he has received an arbitrary, oppressive and unjust exercise of the judicial power of the state.

This result is especially clear in the present case where there was no attempt by the Supreme Court of the State of Ohio to deny outright the applicability of this statute or to construe it as inapplicable. A party litigant has no recourse against such oppressive use of the judicial power by the highest court of a state except those rights that are secured to him by the 14th Amendment.

(4) We have cited under paragraph (2) *supra,* the numerous Ohio decisions under which previous litigants have been accorded the protection of Ohio General Code, Section 9586. In deliberately refusing to apply this statute to petitioners, the Supreme Court of Ohio has denied them the equal protection of the laws of the State of Ohio. This denial is forbidden by paragraph 1 of the 14th Amendment of the Constitution of the United States here invoked.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARVIN C. HARRISON,
Counsel for Petitioners

Of Counsel:

ALLAN HULL,
NICHOLAS CATRI,
PETER CATRI.

April 6, 1951.

(4144)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 666

ROBERT A. FAY, ADMINISTRATOR OF THE ESTATE OF GLORIA ANN FAY, DECEASED, AND ABELYN LARA,
Petitioners,

vs.

HOWARD B. SWICKER,
Defendant,

AND

THE REPUBLIC MUTUAL INSURANCE COMPANY,
Respondent

BRIEF OPPOSING PETITION FOR CERTIORARI

ROBERT GUINTHER,
Counsel for Respondent.

JOHN R. PY,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 666

ROBERT A. FAY, ADMINISTRATOR OF THE ESTATE OF GLORIA ANN FAY, DECEASED, AND ABELYN LARA,
Petitioners,

vs.

HOWARD B. SWICKER,
Defendant,

AND

THE REPUBLIC MUTUAL INSURANCE COMPANY,
Respondent

BRIEF OPPOSING PETITION FOR CERTIORARI

Judgments were awarded against the petitioners by decision of the Supreme Court of Ohio on December 16, 1950. An application for rehearing by that Court was filed, conforming to its rule. The application set out two — and only two — *reasons* for rehearing. Denial of due process or of equal protection of the laws was not assigned as a

reason. Instead, the petitioners said (R. p. 89) that their only reasons were —

> (1) These cases involve insurance contracts. This Court in its pronouncement of the law has made no reference to insurance contracts and has no constitutional or legal authority to reverse these judgments without a pronouncement of law on the issue involved.
>
> (2) General Code Section 9586 does not confer a mere personal privilege which may be waived by agreement.

The brief of petitioners in support of their application for rehearing argued that Sec. 9586 Ohio General Code justified judgment in their favor. The application, construction and effect of that Section had been exhaustively argued in their brief upon the merits and their oral argument before the Ohio Supreme Court before its opinion was announced and were reargued in the brief in support of the application for rehearing.

Wholly as part of the argument in support of the two reasons stated as justifying rehearing, petitioners made a merely incidental statement (R. p. 93) that the Supreme Court —

> "*without modifying or reversing any of the law* **** *of (Ohio)* has deprived these appellees of their constitutional right to the equal protection of the duly enacted laws of our State and Nation."

It is clear that no Federal question was presented by such incidental statement in the application for rehearing.

As one of the *reasons* for rehearing the petitioners asserted that the Supreme Court of Ohio had failed to

make a pronouncement of law, and had no constitutional right to reverse the judgments of the lower courts in favor of the petitioners "*without a pronouncement of law on the issue involved.*"

In support of this reason, the petitioners cited the Constitution of *Ohio* and its prohibition against suspension of laws. (R. p. 93). They said not one word about the Constitution of the United States or the XIVth Amendment thereto. They did not ask for a rehearing on the ground that the Supreme Court of Ohio had not given petitioners "equal protection" under Section 9586. Instead, they asked for a rehearing because the Court had either improperly construed that Section; or had mistakenly failed to apply it. They expressly asserted that the Ohio Supreme Court had "made no pronouncement of law" concerning the Section.

Moreover, they related their incidental statement about "equal protection" (R. p. 93) to their *reason* for rehearing (R. p. 89) by saying that they complained because the Supreme Court of Ohio reversed judgments of lower courts in their favor "without in any way modifying or reversing any of the law" pronounced by Courts of Appeals of Ohio.

Petitioners are in no position to ask this Court to hear them on a question of "due process" or "equal protection" because they failed — completely — to direct attention of the State Court to any such claimed question.

The Brinkerhoff-Faris Case

The petitioners rely solely upon the case of Brinkerhoff-Faris Trust & Savings Company v. Hill 281 U. S. 672, 74 L. E. 1107 to support their petition for certiorari. The case is excellent authority against them.

There a bank had begun an action in the State courts of Missouri to enjoin a county treasurer from collecting taxes on shares of its stock for the reason that such shares were assessed at 100% of their value while other property was assessed and taxed at only about 50% of its value. Denial of equal protection under the XIVth Amendment was asserted in the petition and denied in the answer. The defendants urged that the Bank was guilty of laches because it had not exhausted some rights before the Missouri State Tax Commission. Six years earlier, the Missouri Supreme Court had emphatically denied that the Tax Commission had any of the powers which, according to the defendant, ought to have been invoked by the Bank.

In deciding the Bank's case the Missouri Supreme Court expressly overruled its earlier decision. It said that the Tax Commission possessed the powers which the earlier decision had denied, and that the Bank was guilty of laches in not invoking them.

When the decision was announced, the time for resort to the Tax Commission had expired, and the Bank was left without remedy. The Bank then filed a petition for rehearing in which it asserted — "in addition to its claims on the merits, that in applying the new construction of the (Missouri statutes) in the case at bar, and in refusing relief because of the newly found powers of the Commission the court transgressed the due process clause of the XIVth Amendment."

It is clear, thus, that the Bank presented the "equal protection" question by its original petition and that it presented an "additional" due process question in its application for rehearings. Its questions were *squarely* presented to the State Court, whereas, in the instant case,

the petitioners never *squarely* presented any federal question at all to the State Court.

And, in the instant case, the petitioners fully and exhaustively argued to the State Court their views concerning the effect of Sec. 9586, Ohio G. C. whereas, in the Missouri case, the Bank never had any opportunity to present its views as to the state statutes and, as this Court said, (p. 678 of 281 U.S.) was denied "due process of law — using that term in its primary sense of *an opportunity to be heard* and defend its substantive right."

But, more importantly, the Missouri case was reviewed by this Court because the state court reversed a previous precise ruling which it had made concerning the powers of the State Tax Commission and announced that reversal after the time in which the Bank could invoke the "new found" powers of the Tax Commission had expired, thus depriving the Bank of any remedy, and denying it any hearing at all. In the instant case, the Ohio Supreme Court did not reverse any prior decision of its own, and (as petitioners admit) did not reverse or modify any decisions of the Ohio Courts of Appeals concerning Section 9586, Ohio G. C. In the instant case there was no denial of due process as in the Missouri case, and there is no Federal question in the case — certainly none to which the attention of the State Court had been adequately directed.

And, in the case from Missouri, this Court said emphatically (p. 680 of 281 U.S.)

> "This court's power to review decisions of state courts is limited to their decisions on federal questions: the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party

relied, does not give rise to a claim under the XIVth Amendment or otherwise confer appellate jurisdiction on this court."

In the instant case, petitioners sole complaint is that the Ohio Supreme Court has rendered erroneous decision on a question of state law — i.e. the application and construction of Sec. 9586 Ohio G.C. They admit that there has been no reversal of principles or doctrines established by previous decisions.

Plainly, then, this Court will decline to accept the appellate jurisdiction which petitioners ask it to exercise.

Conclusion as to this Point

(1) No Federal question was squarely presented to the State Court at any time.

(2) The State Court did not decide any Federal question.

Hence, there is no occasion for exercise of appellate jurisdiction by this Court.

WHAT THE STATE SUPREME COURT DID DECIDE

Petitioners try to say that the Ohio Supreme Court did not apply or give effect to Sec. 9586 Ohio G. C., which declares that a solicitor of insurance is an agent of the insurance company and not of the insured.

The Supreme Court in its opinion (R. p. 67) queried whether that Section applied at all to solicitors of *casualty* insurance — the kind for which an application had been made. It reviewed the legislative history of the section and pointed out that it was enacted to apply only to solicitors of *fire* insurance. It said that "whether Sec. 9586 applies

to solicitors of insurance other than on buildings or structures is not important in the present cases," because there was no denial that the solicitor was an agent of the insurer. Instead, the only issue was as to the scope of employment and authority of the agent.

The Ohio Supreme Court followed a view, announced by this Court, in its opinion in *Sun Insurance Office v. Scott, 284 U.S.* 175 at p. 181 when this Court said

> "The respondent insists that *** the uncontradicted evidence that Bracken, the insurers' local agent, knew of the chattel mortgage constitutes a consent on the part of the insurers that the policies should remain in force notwithstanding the encumbrance. He claims that for this purpose the knowledge of the agent is that of his principals. Reliance is placed upon Section 9586 of the Ohio General Code, which makes a person who solicits or takes an application for insurance the agent of the company, 'anything in the application or the policy to the contrary notwithstanding.' He asserts that the decisions of the Ohio courts interpreting this statute are to the effect that the agency thus imputed to the solicitor extends to all matters of contract with respect to the policy, including consent to the alteration of its terms.
>
> "On its face the statute does not go so far. We have examined the authorities cited (the Foster case and the Glass case) and fail to find that they give it any such force or effect. They do not, as respondent claims, define the scope of the agency created by the statute, but leave it to be defined by applicable principles of common law. In the present cases *the policy limits its scope, and we think the written contract must control.*"

This Court had declared that the Ohio Statute did not define the "scope of the agency," but left it to be defined by applicable principles of common law. In the instant case, the Ohio Court declared that the solicitor was the agent

of the insurer, but announced that the "scope of his authority" was limited by the terms of the very contract upon which petitioners relied as the foundation stone for their case. The contract said in effect that knowledge of the agent should not be imputed to his principal. Thus, by contract, the petitioner agreed that, whether or not the agent knew that the application for insurance contained false statements, his knowledge could not be imputed to the insurance company, and that it could assert that the claimed contract was void *ab initio* by reason of false warranties made by the applicant which induced the insurance company to sign it.

The petitioners have read into Section 9586 some words which are not in it. As enacted by the Ohio legislature it reads:

> "A person who solicits insurance and procures the application therefor shall be held to be the agent of the party, company or association, thereafter issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

Petitioners have persistently misread the section as though it said —

> "A solicitor of insurance is the agent of the company, and the scope of authority of that agent is so broad that it includes power to bind his principal by any matters of fact of which he has knowledge even though uncommunicated to his principal, and even though the contract which is sought declares that he has no such power."

The Ohio Court did not accept petitioners' rewriting of the statute, but it did nothing more than to determine the scope of the agent's power. It did not declare that he was not an agent, nor deny effect to Section 9586. It inter-

preted and construed that section, and the powers of an agent under it.

Petitioners complaint is that the Ohio Court erroneously declared the law of Ohio growing out of the section. The Ohio Court did not err. It followed the declaration made by this Court in the Sun Office case and said (R. p. 68).

> "However, we know of no sound reason why two parties cannot enter into a valid contract substituting a different rule for the common-law doctrine of imputed knowledge and agreeing that it should not be binding as between them, and there is nothing in the language of Section 9586, General Code, which prohibits or restricts a right to make such a contract."

And whether the Ohio Supreme Court erred or did not err is beside the point. If there was an error it was wholly an error as to a question of state law — not federal. This Court does not review errors of decisions as to state law.

Conclusion

The petition for certiorari should be denied.

ROBERT GUINTHER, of
Slabaugh, Guinther & Pflueger,
Akron, Ohio,

Counsel for Respondent.

JOHN R. PY, of Flynn, Py
& Kruse, Sandusky, Ohio,

Of Counsel.

May 31, 1951